

Supreme Court, U.S.  
FILED

No. 05-

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**Supreme Court of the United States**

MICHAEL WIRZBURGER, ET. AL.,

*Petitioners,*

v.

WILLIAM F. GALVIN, ET. AL.,

*Respondents.*

**Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether this Court should resolve the conflict among courts of appeals over the proper level of scrutiny under the Free Speech Clause of content-based censorship of political expression in state initiative processes.
2. Whether nativist state constitutional provisions that uniquely prohibit citizen initiatives from either touching on religion in general or addressing funding for religious schools in particular fail the constitutional requirement of neutrality under the Free Exercise Clause and Equal Protection Clause.

**PARTIES TO THE PROCEEDING**

Petitioners, Michael Wirzburger, Susan Wirzburger, Rita Zubricki and Elizabeth Zubricki were the plaintiffs-appellants below. Respondents were defendants-appellees below and are Massachusetts state officials: William F. Galvin, Secretary of the Commonwealth of Massachusetts, Mitt Romney, Governor of the Commonwealth of Massachusetts, David P. Driscoll, Commissioner of Education of the Commonwealth of Massachusetts, Timothy P. Cahill, Treasurer and Receiver General of the Commonwealth of Massachusetts, Tom Reilly, Attorney General of Massachusetts, and James A. Peyser, Chairman of the Massachusetts Board of Education.

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**PETITION FOR A WRIT OF CERTIORARI**

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Michael Wirzburger, Susan Wirzburger, Rita Zubricki, and Elizabeth Zubricki respectfully petition for a writ of certiorari to review the judgment of the United States Court Appeals for the First Circuit in this case.

**OPINIONS BELOW**

The opinion of the First Circuit is reported at 412 F.3d 271. Appendix ("App.") at 1a. The opinion of the United States District Court for the District of Massachusetts is reported at 311 F. Supp. 2d 237. App. 25a.

## JURISDICTION

The First Circuit's judgment was entered on June 24, 2005. App. 1a. On July 21, 2005, the First Circuit denied panel rehearing. App. 59a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." *Id.*, amend. XIV.

The relevant provisions of the Massachusetts Constitution are set out in the appendix. App. 60a-63a.

## INTRODUCTION

At the zenith of their power in Massachusetts, the Know-Nothings in 1855 passed an Anti-Aid Amendment to the Massachusetts Constitution that allowed state funds to support Protestant Christian religious instruction in the public schools, but prohibited the Commonwealth from funding private Catholic schools. In 1917, as nativist forces sensed their political power was on the wane, they pulled up the ladder, amending the constitution with a pair of exclusions that made it impossible for Massachusetts citizens to use the initiative process to roll back the nativist parts of their commonwealth's Constitution.

Since then, Massachusetts has selectively enforced the Anti-Aid Amendment, applying it *exclusively* against its original target—private schools (which remain predominantly religious and Catholic today). Petitioners sought to change the Anti-Aid Amendment through the

citizen initiative process to allow indirect aid to flow to religious schools, but were prevented from doing so by the 1917 initiative exclusions.

Although the motivations of the individual state actors may have changed over the years, the intent and effect of Massachusetts' constitutional provisions have remained the same: to single out for disapproval one viewpoint and one group of people. Just as this Court does not suffer vestigial Jim Crow laws to be used today to prohibit political speech and enable discrimination, *see, e.g., Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985), so too it should make clear that enforcing nativist laws to limit speech and discriminate between groups offends the Constitution.

This Court should also grant the writ to mend the widening split among courts of appeals over what level of scrutiny to apply to content-based censorship of political expression in the initiative process.

## STATEMENT OF THE CASE

**1. Petitioners' initiative attempt.** Petitioners Susan Wirzburger and Rita Zubricki send their children to Catholic schools in Massachusetts, where they can receive a religious education unavailable in public schools. App. 2a. This case concerns Petitioners' attempt to use Massachusetts' initiative process to effect political change to their advantage, by allowing public educational funds to follow needy students to religious schools, thus reducing the burden Petitioners face in paying for both a religious education and public, non-religious schools. Petitioners tried to modify by initiative a provision of Massachusetts' constitution known as the Anti-Aid Amendment<sup>1</sup> that

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<sup>1</sup> MASS. CONST. amend. art. XVIII. App. 60a.